

APARTMENT LAW IN MALAYSIA BUYING PROPERTIES WITHOUT TITLE : LEGAL POINT OF VIEW

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ABSTRACT

Strata titles type of property has given rise to many affecting problems affecting all parties interested in dealings with it as to the development, financing and ownership of subdivided buildings. The issue that had arisen has become an issue of great urgency in lieu of the legal transaction to transfer the ownership for strata title properties. The existing laws have many loopholes and not handy when problems come along. The amendments propose only for the problem in relation to management and maintenance of the buildings as well as the further interpretation of the property itself. There are no guideline as to the procedures in conveyancing. The conveyancing practice and procedures adopted by most solicitors to transfer this type of property is insufficient to cater problems that arise in many cases. The existing practiced must be reviewed by the Bar Council to put the laws and the development at the same pace. However there are still so many question left unanswered pertaining to the purchase of the property, to finance the property , to complete the construction of the property and to the solicitor, as to how to expediate the transaction. This paper will give the explanation as to why the problems were created during the transfer of the ownership and to whom do they reflect.

Keyword : Land Titles, Condominiums, Apartments, Law , Legislation, Malaysia, Strata Title, Properties, Transaction and Conveyance.

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1.0 INTRODUCTION

- 1.1** The 20th century has seen a trend of increased urbanization in most countries including Malaysia. Urbanisation is a process of change in the growth and social-economic characteristics of urban centers as a result of the increasing concentration of population and economic activities in urban areas over time. In Malaysia the urbanization process began with the provision of basic infrastructure and physical facilities particularly to cater for the exploitation of resource-rich areas along the West Coast of Peninsular Malaysia. This process continued at a more rapid pace after independence with the provision of better urban amenities and service and improved accessibility in international markets. As a result, a concentrated pattern of development naturally evolved in and around the established urban areas of the Klang Valley, Johor Bahru, Georgetown and Ipoh.
- 1.2** This urbanization has lead to the development and change of pattern in property ownership. More and more high rise building had been built and it offers a different types of property ownership other than landed property. This type of property offers a right over a property in the absence of the strata title. This strata title is not only unavailable at the point of the purchase but it had caused legal dilemma to ascertain the accurate measures for the laws itself. It has than lead to the introduction of the law under the Strata Titles Act 1985.³ Before the enactment of the Strata Titles Act 1985, provision for subdivision of building was provided in the National Land Code 1965. Many inadequacies were discovered in terms of technical and legal requirements. Thus the need to implement a new and better legal framework arises which ultimately leads to the introduction of the Strata Titles Act 1985.

2.0 PROBLEM CREATED BY THE URBANISATION TO PROPERTY OWNERSHIP

- 2.1** Construction of condominiums, apartments, flats, and high-rise buildings in the urban areas such as Kuala Lumpur, Johor Bahru and Penang is a common phenomenon due to scarcity of lands in those areas and high land costs. The property market boom supported the massive development carried out in urban areas. This has encouraged some developers to construct their projects before the ownership of title has been issued. The effect is that the transfers of such properties can be problematic where there may be delays in transferring property rights to the respective purchasers. Since the transfer of title properties involves some interested parties such as developers, financiers, buyers and solicitors, the problem can have certain implications to one or more parties.
- 2.2** In the absence of the relevant title being issued, the Sale and Purchase agreement together with the Deed of Mutual Covenant is executed as provided

3Teo Keang Sood, pg 5, Strata Title In Malaysia.

under Schedule H of Housing Developers Act (Regulation 11 (1)) in lieu of Memorandum of Transfer (Form 14A) as provided under the National Land Code 1965. However for the purpose of finance, banking legal system requires the Loan Agreement cum Assignment to be executed ⁴ in lieu of Charge Documents (Form 16A) as provided under the National Land Code 1965. This process of execution of the Loan Agreement cum Assignment is not provided in any Statute. Thus the documentation depends on the discretion of each bank (s) or financial institution(s) concerned. Some banks or financial institutions may even require a Power of Attorney to be included as well and hence cause even lengthy procedures for transfers .

- 2.3** By reason of unavailability of strata title or sub-divided title, the solicitor could not conduct a land titles search at the land office to determine the registered legal ownership of the property concerned. In such situation , the solicitor could only apply to the developer for consent to sell the property on behalf of the vendor.⁵ In normal practice the developer will give its consent for the sale of the property provided that the administrative charges, if any or the maintenance fees have been settled. ⁶
- 2.4** The issue that arises from this practice is on the uncertainty on both the vendors and purchasers of such properties. On the part of the purchaser, the difficulty arises when the property is sold to another party. In such cases a new permission will have to be obtained and matters could be worse when the original Sale and Purchase Agreement which is treated as important as the Title Deed is lost. In such a situation the purchaser or unit owners is uncertain of their rights over the property that they purchased. On the other hand the developer or the seller could also create problems. There are some cases where the developer's firm was wound up⁷ or the developer's office for the project has been shifted to its main office (normally back to Kuala Lumpur) ⁸. This will give rise to inconveniences in getting the Developer to sign the relevant legal documents.
- 2.5** Legal firms acting for the Developers in respect of Projects pending issuance of strata title or sub-divided title cannot close their files for at least six (6)⁹ years and sometimes more than ten years¹⁰ because they have to wait for the titles being issued, prepare the Memorandum of Transfer to register the property owner's name and also the Memorandum of Charge. In this long process, sometimes , the solicitors have difficulty in contacting the client who may have resided elsewhere without informing them. In order to avoid the inconveniences of having to contact the client back again to sign the Transfer and Charge Forms when the title has been issued, some legal firms, banks or financial institutions require the Owner of the property to execute those forms

⁴ National Land Code 1965, Section 214,216 & 217.

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⁷ Pak Soon Land Sdn Bhd.

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in escrow (blank).¹¹ However the Bar Council has now prohibited this practice and this has cause transfer of strata title properties to be more difficult. Although the Strata Title Act 1985 provides the legal procedures for transfer of strata tiles properties, there still some grey areas, which are not covered by the Act. This has created inconsistency in the legal practice adopted by lawyers. The issue arises out of this practice are, how to deal with problems where a purchaser subsequently transfer such property to another purchaser. Is it possible to prepare and stamp the Deed Of Assignment between the First Purchaser and Second Purchaser or to prepare a 'Novation Agreement', which is a more flexible agreement. Because of the lack of consistency, there has been a delay in completing the transaction of the Sale and Purchase Agreement in relation to properties pending issuance of title. Confusion and misunderstanding on the problems of delay have arisen amongst lawyers, bankers, developers and parties to the Sale and Purchase Agreement.

2.6 There are a few questions that this paper hope to resolve. These are in relation to the nature of the properties subject to Strata Title and the problems that arise during the transaction procedures. The followings are some of the questions that are addressed in this paper.

1. What are the general problems that are related to the transaction of strata title properties ?
2. What are the implications faced by the parties interested in transaction of strata title properties ?
3. What are the causes that lead to the problems in transfer of strata title properties ?

3.0 Procedures in Conveyancing

There is no specific legislation in Malaysia dealing with the sale and purchase of property. Therefore, the Contracts Act ¹² and the Specific relief Act ¹³ apply in matters affecting the contract for sale. The relevant provisions of the National Land Code¹⁴ relating to the transfer of land are also applicable. Besides these legislation, English common law and equitable principle ¹⁵are also relied upon. In case of strata units properties, Although the Strata Title Act has managed to resolve some of the problems of the earlier legislation, there remain some areas that were not covered. An important aspect is on conveyancing procedures. The implication of this is that the normal procedures adopted by solicitors are being copied.

3.1 Conveyance procedures for properties with titles are similar to strata title properties. While conveyance of properties with titles may seem straight forward as the relevant documents are available, strata title properties may be

¹¹ Ibid.

¹² See Contract Act 1950

¹³ See Specific Relief Act 1950

¹⁴ See National Land Code 1965

¹⁵ See Trustee Act 1949 (Act 208)

subjected to some difficulties, which may lead to a longer time taken to complete, or it may lead to uncertainty for owners to some extent. The problem created due to the absence of proper procedures will be discussed in the next section.

4.0 STRATA TITLE PROPERTY TRANSACTION AND ITS EFFECTS ON INTERESTED PARTIES

This section examines the effect of transactions of strata title properties on the interested parties. Its aim to illustrate that the problem involve a chain of reaction and hence the necessity to address the problem with great urgency. The time factor for non-issuance of strata titles brings severe effects, which could be highlighted from the view of the interested parties who are affected by the legal transaction and those are the unit owners and / or the borrowers, the developers and the financiers, and the solicitors themselves in the process of conveyance of the strata title properties. This section will firstly examine the effects of the transactions to the owners by describing the difficulties and disadvantages and advantages to the owner. Then it follows with the implications it gives to the developers by pointing out the advantages and disadvantages that the developers face in the event of the transactions. The next point is the issue on the financiers. It describes the risks involve in financing strata title properties. Finally, the discussion is on the problems areas and highlights the finding from the viewpoint of the solicitor.

4.1 Unit owners

The unit owners of strata title properties are the ones that suffer the most from the adverse effects due to the absence of strata title. From the interviews and observation of various purchasers and from several court cases, these effects can prove to be more than what these owners should suffer since the non-issuance of strata title is not caused by them. The following describes some of the effects of Strata Title property transaction to the owner.

4.1.1 No Security of Ownership

A purchaser of a unit or parcel in subdivided building to which strata titles has yet to be issued would not have the rights to indefeasibility of title provided under the National Land Code (hereinafter referred to as NLC). Hence there is no security of ownership.

Even though in the Sales and Purchase Agreement (hereinafter referred to as the SPA) signed between the developer and the financier which normally stipulates that the developer will take the necessary steps to apply for strata titles, and the Strata Title Act 1985 which imposed a penalty on developer who fails to apply for strata titles within the stipulated period, the problem pending the non-issuance of strata titles still remains.

In the absence of strata title, the provisions in the Strata Title Act 1985 do not fully protect the purchasers, as before strata titles are issued, the developers are still the legal owners of the Land on which the buildings stand. Only upon the issuance of the strata titles will the purchaser receive the legal rights to the property. Then only his name can be transferred to and registered in the title and he is finally legally known as the "registered owner". Only after the registration of the owner's name in the document of title his or her legal rights are protected under the NLC. Prior to the issuance of strata title, the unit owner's sole proof of ownership is only in the SPA. This presents various shortcomings to the unit owner in protecting his legal rights and title to his property.

Under the Torrens System that is adopted in Malaysia, title to one's interest in land vests and divests only upon registration and registration constitutes the final stages of any dealings. No title for or interest in land will be transferred or created until the instruments affecting these dealings have been duly registered. As such, as long as strata titles are not issued, registration of the transfer of interest from the vendor to the purchaser cannot be carried out. Legally speaking, according to the provision in NLC, title to land will not be transferred if there is no registration. In this sense, the purchaser is actually not the "legal owner" of the unit he purchased. According to Siti Norma Yaakon J.¹⁶

"the issuance of strata title.....is the final act that establishes the plaintiff (i.e. the owner as the registered proprietor of his flat".

Accordingly, without the strata title, the purchaser or owner would not have the rights of indefeasibility of title provided under the NLC. Section 340(1) of the NLC provides:

"the title or interest of any person or body for the time being registered as proprietor of any land, or whose name any lease, charge or easement is for the time being registered shall Be indefeasible"

A title once registered is indefeasible. The question that arises now is that, if there is no title that can be registered as in the case of non-issuance of strata title, how can there be indefeasibility of title? If there is no indefeasibility of title, it simply means that the security of ownership of owners can be jeopardized. Since without title, the owner has only a contractual right to the property. Which is solely based on the SPA. As such, the security of ownership depends heavily on the manner the registered owner of the master title conducts his business.

Even though the purchasers who bought the units in a subdivided building have paid the purchase price, there is nothing in the Strata Title Act 1985 that prohibits the developer or proprietor who still holds the master title from using it as a collateral for loans and later charged the title to the bank. When the

¹⁶ The judgement given in the case of Lee Wai Kin v. Yulek Sdn.Bhd (1986)2MLJ 418.

application for subdivision of building under section 10(1)(d) is made, it is permissible for a charge to be registered over the master title and the written consent or the charge needs to be obtained first before making the application. However, at the stage when approval is to be granted for the issuance of strata titles, the charge in question must be discharged or removed from the land before approval can be granted. Though these provision undoubtedly seeks to safeguard the interests of the purchasers of parcels by ensuring that they acquire the parcel free from all encumbrances when separate titles are issued, there is still no guarantee that the developer will not charge the master title. As long as there is a charge, approval for strata titles cannot be granted. Since there is no penalty imposed, the developer can still continue to charge the land to the financiers for financing at the expense of the security of units owners. The only results is that approval for strata titles will not be given and the losing end is a unit's owner themselves and the developer still has the financial benefit. This possibility automatically puts a sense of insecurity in the buyers should the developer runs into financial difficulties. Moreover, with the main title kept by the bank, it is equivalent to the bank having possession of the entire building.

4.1.2 Difficulties In Obtaining Financing

The security in ownership leads to the difficulty in obtaining finance. The other aspect of the problems that confront the purchasers of units in subdivided building is in obtaining loans to finance the purchase of his unit. Initially when the concept of strata titles was first introduced, many financiers were reluctant to release funds to finance the purchase of units. However, as construction of high-rise buildings becomes popular, many financiers are now willing to finance the purchasers. The purchasers will sign the Loan Agreement Cum Deed of Assignment instead of the normal loan agreement and then charge the property to bank as collateral.

Although Loan Agreement Cum Deed of Assignment (LACA) has been accepted as a security, the purchaser's choice of financier is very much restricted especially if a particular project is end-financed by a master facility or consortium of financial institutions.

Financiers are very careful in giving out loans to purchasers of strata units and one of the criteria that many look for is the reputation of the developer. If a developer is backed by strong financial background and has good track records, obtaining finance is not much of a hassle. But if the developer is a first time operator or a one-time operator who is new property developer or having poor financial record and reputation, financiers normally hesitate to give out loan.

The choice of choosing a financier will be more limited with the government servants. Currently, the government imposed several conditions that have to be fulfilled before loan can be given out. Comparatively, it is not as easy to obtain financing from government in the case of high-rise buildings as are for lots on land. The requirements imposed by the government for financing are met with

much reluctance from the developer who normally is incapable to fulfill the requirements. On the other hand, in giving out loans, most commercial banks require the developer to be the third party in the loan agreement where the developer would sign, approve and certify the purchase of the property. Unless the developers comply with this requirement, financiers decline release of loans.

Furthermore, financiers also require a letter of undertaking from the developer's financiers (if any) to confirm that they (developer's financiers) would exclude the property purchased by the client of financiers from legal actions (such as auction) should the developer default the payment of loans.

This series of legal documentation made procedures for financing lengthy and complicated. Again, too many parties are involved in a single loan agreement (i.e. the purchaser, the financier and the developer). This would automatically increase the administrative and legal cost for a single loan agreement. Yet no party can do without these lengthy procedures since each party needs to protect their own interest too.

As a result of the complications involved, it would not come as a surprise that some financiers are reluctant to give financing to strata units especially in the case where the developers do not have a good track record and reputation. Unless and until strata titles are issued, such incidents highlighted above will continue to exist for the time being.

4.1.3 Uncertainties of the Future

The welfare and future of the units owners depend heavily on the developer so long as the strata titles are not issued. If the developer is not responsible, then the ownership status of the buyers is at stake. The future interest of the owner remains uncertain particularly when the developer is one-time operator, which exists for the purpose of a particular project. Once project is completed, the developer's company would resolve and cease to exist. In such cases, the prospect of obtaining the issuance of strata title may be remote, as this would not be resolved. In such cases, the prospect of obtaining strata titles may be remote as there would be no one to deal with the relevant government offices should any problems regarding the application for strata title arise. Many complications may arise if the developer ceased to exist and unit owners are left with an unfinished deal in the sense that the title may not be issued at all.

In the absence of strata titles, the normal procedures are for the developer to keep records of all transactions to keep track with the subsequent sales and changes in ownership. As such, consent for subsequent sales is to be obtained from the developer. If the developer is not responsible or does not keep proper record or the record is misplaced or missing, this may open an avenue for fraud if parties to the subsequent transactions do not verify the particulars. The question may arise in cases where there have been several changes of ownership. This may cause difficulty in tracing the real owner to the property. The purchaser would find difficulties in verifying who is the last owner of the

property. As such, bone fide owner may find complications should he decide to sell off this property.

Another problem that will arise is the case where the developer goes into bankruptcy, being wound up or being liquidated and went into receivership. Though such case has yet to happen, there is no guarantee that it will not happen in future especially if developer faces financial difficulties. In the case of bankruptcy, all the property of the developer would go to the Official Assignee or the Receiver. All administration matters including the application for strata titles will be under the responsibility of the Official Assignee. Though the owner's legal right will not be affected, doubts will certainly arise as to whether the Official Assignee would continue to settle matters relating to the application for strata's titles as fast as possible.

Another question that arises when the developer goes into bankruptcy is that consent for sub-sales of property will have to be obtained from the Official Assignee. Though consent may be given, the vendor may have to go through some complicated procedures in obtaining the consent. This would not be as convenient if the consent were to be obtained from the developer. Again, further doubt will arise concerning efficiency of the Official Assignee in keeping the proper records of owners due to lack of knowledge and experience in dealing with land matters that is unique and complicated particularly in the case of strata titles.

4.2 Developers

Though having the advantage of higher density over the land use, developers who undertake the development of subdivided buildings today are faced with far more problems than never before. With the delay of issuance of strata titles, developers also suffer from the adverse implications describes below.

4.2.1 Extra burden in the management of completed projects

For low cost buildings, Management Corporation cannot be established until the issuance of strata tiles. In the interim period between the completion of project and the issuance of strata titles, it is under the operation of the law that the developers need to organize the management of the buildings.

This poses a major headache for the developers. As compared to normal properties developed with individual land titles, developer do not have to organize for the management and maintenance of the completed buildings. They can "lay off" their hands once the projects are completed. But situation differs in subdivided buildings. Developers cannot "lay off" their hands until Management Corporation can officially be established. Although the properties subject to non-issuance of title are transacted, the developer still faces the burden to manage the completed buildings.

4.2.2 Extra cost and staff involved

As a result of the delay in the issuance of strata titles, the responsibility of managing the building falls on the shoulders of the developers. This proves to be an extra burden where cost and staffs need to be involved. The burden of existing staffs is increased because they need to take time off to settle the problems of the residents. Sending bills and attending to the complaints need to be done. In addition, extra cost is incurred for postages, envelopes, etc.

Keeping records of ownership is not a major problem for both small number of low cost buildings and flats, which are recently completed. But for developers of condominiums, high-rise apartments and shopping complexes where shop units are sold individually and were completed several years ago, keeping track of the records of ownership can be somewhat grueling. All these involved cost and time. Hence there is a high management cost that are involved in the development of high rise buildings.

4.2.3 Master Guarantee / Indemnity deposit over the end financing

When the developer decided to embark on development of subdivided buildings, the first problem that they will first encounter is with the end financier. This is because banks or loan provider normally requires the developer to provide a master guarantee of indemnity deposit over the end financing granted to the purchasers of the units, where the purchasers opted to obtain finance from the banks or financial institutions. Such master guarantee or indemnity deposit is to subsist until strata titles are issued by the Land Office. This requirements imposed by the financiers effectively create a contingent liability on the part of the developer. Legally speaking, under such an arrangement, the developer provides a guarantee over the loans taken by his purchasers. As long as strata titles are not issued, the master guarantee will continue to exist. From here, one can imagine the extent of liability if the purchaser default in their obligations to service the loans.

4.2.4 Creation of caveats on master title

In order to secure interest on subdivided buildings purchasers or financiers requires to create a caveat on the master title. This creation can lead to enormous problem to the owner of the land who is usually the developer. Any person who has a claim in the title to or any registrable interest in an alienated land or any right to such title or interest may apply for the entry of a caveat on the register document of title.

With the creation of caveat on the register document of title, as long as the caveat continues in force, it shall prohibit the registration, endorsement or entry on the register document of title any instrument of dealing executed by or on behalf of proprietor. Accordingly the Registrar of Title or the Land Administrator shall reject the instrument or the application for endorsement or entry.

In other words, with the existence of caveats on the master title, the developer cannot sell the land should he decide to do so. Presently, most financiers also insist on lodging a caveat on the master title when giving loans to the purchaser in addition to the loan agreement cum deed of assignment. This creates a string of administrative problems to the developer when the master title covers a huge area, over and above the site upon which the project is being developed. As regards to this it will prevent the owner from making further dealings on the land and this may cause difficulty on the part of the developer to obtain further finance for the development. Furthermore should any legal disputes arise, and the refusal by any party to withdraw any of the caveats, would give rise to massive problem to the developer of having to clear these encumbrances once strata title are issued.

Apart from financiers, purchasers also have the right to enter caveats on the master title. When the registered proprietor, for example, decided to sell the lots to individuals where the Strata Titles are not issued yet, consent and approval from the owners of shop lots need to be obtained first. The owners have to agree first to remove the caveats so that the transaction can be completed. This creates a lot of administrative problems to the registered proprietor and much time needs to be taken in getting the caveats removed. In other words, transaction cannot be done as conveniently as are lots on the land.

4.3 Financiers

In financing strata title units, financiers normally face a lot of extra administrative complications. In addition to the normal loan agreement, financiers require a deed of assignment. Apart from this, financiers also require developers to be the third party in the loan agreement. The developer then would have to certify and approve the purchase of the property.

A letter of undertaking from the developer's financiers to confirm that they would exclude the property purchased by the purchaser from any future legal actions, such as auction, should the developer default in servicing the loans. All these extra requirements are necessary to protect the interest of the financiers in addition to the legal cost involved in a simple loan agreement.

4.3.1 Restriction in dealing

Dealings on strata title properties are also restricted. The writs of sale subjected to Strata Title could be cancelled due to the failure of obtaining loans. Hence it can be seen that dealings of strata units are not as convenient and as freely as are lots on the land. Previously it was illustrated that some purchase was aborted because purchaser was not able to secure loans. It is recommended that extra care must be taken when buying units without strata titles especially when the records of ownership kept by the developer is not proper.

4.3.2 Complications in dealings

Apart from the above restrictions, dealing on non-issuance of title properties are also complicated. To a conveyancer and / or a solicitor, there are too much complications involved in simple dealing of strata titles units. In the case of sub-sales for example, a purchaser need to verify with the developer the ownership of the unit to ensure whether the vendor is the last registered owner in the records of the developers.

Later, approval from the developers needs to be obtained. This has to be done because the master title is still registered under the name of the developer and the developer is still the owner of the property. If at this stage, the developer do not approve the sub-sale, then the transaction would not have taken place.

More problems would arise if a property has changed ownership for several times, especially if the developer does not keep proper records of ownership. In such circumstances, verification of ownership would be in doubt and it is therefore strongly advice that the purchasers do not purchase the property. Again , if sub-sales were to take place in cases where the developer has been wound up or gone into bankruptcy. The verification of particulars and approval need to be obtained from the Official Assignee. In such cases , the transaction might take some time before it can be completed. The period taken would heavily depend on how efficient the Official Assignee works on it.

The problems of strata titles property has given rise to a multitude of problems affecting all parties involved in the development, financing and ownership of subdivided buildings.

5.0 Conclusion

In Malaysia this critical issue has been in existence for more than a decade already. It has become an issue of great urgency in the present day in view of various implications discussed earlier. As more and more strata title units are being constructed , couple with the not so well developed land administration system, the problem continues to increase in magnitude as days goes by. The trend of urban developments towards the next decade and beyond will be mainly in the form of medium and high density development and it is therefore very essential that the authorities together with the private sector take effective steps to resolve this understanding issue.

Hopefully, with the coming up of the development, there will also be an extensive development in respect of the laws itself, so that the laws are handy in settlings problems and does not be left far behind from the development itself.

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